

**MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT**

DATE: WEDNESDAY, DECEMBER 15, 2004
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

CALL TO ORDER

Chairperson Peter Young called the meeting of the Commission on Water Resource Management to order at 9:05 a.m.

ROLL CALL

The following were in attendance:

MEMBERS

Mr. Peter Young
Ms. Meredith Ching
Mr. Clayton Dela Cruz

Mr. James Frazier
Dr. Chiyome Fukino
Dr. Lawrence Miike
Ms. Stephanie Whalen

STAFF

Deputy Director Yvonne Izu, Roy Hardy, Ed Sakoda, Dean Nakano, Glenn Bauer, David Higa, Dean Uyeno

COUNSEL

Linda Chow, Esq.

OTHERS

Rosemary Liu, Jane Lovell, Gordon Tribble, Jeffrey Tyau, Teresa Dawson, Kapua Sproat, George Tengan

All written testimonies submitted at the meetings are filed in the Commission office and are available for review by interested parties.

{Note: language for deletion is [bracketed], new/added is underlined}

APPROVAL OF MINUTES

The Commission amended the following:

Page 5, Item B-2, last paragraph, under Discussion:

Commissioner Miike stated that, in his opinion, if the caprock were recharged with R-1 water, it would be fine as long as there is no connection between the caprock and other [~~line-based~~] basal aquifers.

Page 6, Item C-2, second paragraph, under Discussion:

Commissioner Miike felt it should be on the [applicant] person or party asserting the right and that it should not be up to the Commission.

Commissioner Miike commented that along with the correction above, he felt that the Commission does not have the authority to determine whether a native right exists.

MOTION: (Frazier/Whalen)

To amend the minutes of the November 16, 2004 meeting as circulated.

UNANIMOUSLY APPROVED AS AMENDED

SUBMITTALS

WATER USE PERMIT APPLICATIONS (WUPA)

A-1. Application for a Water Use Permit, Kapaka Farm 1 & 3 Wells (Well No.3554-01 & 3654-03), TMK 5-3-012: 001, WUP Nos. 529 & 530, Future (Agricultural) Use for 0.039 & 0.190 mgd, Koolauloa Ground Water Management Area, Oahu

PRESENTATION OF SUBMITTAL: Ryan Imata

RECOMMENDATION:

Staff recommends that the Commission:

1. Find the applicant in violation of the Laie Contested Case Decision and Order (CCH-OA96-2), dated December 7, 1998, requiring the applicant to file and application within 180 days.
2. Assess a fine of \$1,800 for the violation in recommendation 1.

3. Upon submission of the fine, approve the issuance of water use permit no. 529 & 530 to Kapaka Farm for the reasonable and beneficial use of 0.039 & 0.190 million gallons per day of potable water for agricultural use from the Kapaka Farm 1 & 3 Wells (Well No. 3554-01 & 3654-03), subject to the standard water use permit conditions listed in Attachment B and the following special conditions:
 - 1) Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.
 - 2) In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

DISCUSSION:

Staff made a correction to the above under Recommendation, item #3:

Upon submission of the fine, approve the issuance of water use permit no. 529 & 530 to Kapaka Farm for the reasonable and beneficial use of ~~[0.039]~~ 0.038 & 0.190 million gallons per day of potable water for agricultural use from the Kapaka Farm 1 & 3 Wells (Well No. 3554-01 & 3654-03), subject to the standard water use permit conditions listed in Attachment B and the following special conditions:

Mr. Jeffrey Tyau provided the Commission a brief background on Kapaka Farms and asked the Commissioners to consider assessing a reduced fine or a warning.

Commissioner Frazier noted that the reporting of water usage from Kapaka Farms was consistent throughout the period and urged them to continually turn in their data.

MOTION: (Miike/Whalen)
To approve as amended by staff
UNANIMOUSLY APPROVED

STREAM CHANNEL ALTERATION PERMIT (SCAP)

B-1. Application for a Stream Channel Alteration Permit (SCAP-MA-370), Imi Kala Road Bridge Replacement, Hale Mua Properties, LLC, Iao Stream, Maui (TMK 3-4-20:, 3-4-32:)

PRESENTATION OF SUBMITTAL: Ed Sakoda

RECOMMENDATION:

That the Commission approve a stream channel alteration permit for the replacement of the Imi Kala Road Bridge at Iao Stream (TMK 3-4-20:, 3-4-32:), Wailuku, Maui. The permit shall be valid for two years subject to the standard conditions for stream channel alteration permits in Exhibit 6.

DISCUSSION:

Commissioner Frazier asked if the property had two landowners. Staff indicated that there is, due to a property line to the center of the stream. Commissioner Frazier expressed concerns over the development of new homes being constructed in the area and questioned how the Department of Water Supply will be able to provide enough water. Commissioner Ching asked staff if the applicant is aware that this is a permit for a bridge construction only, and there is no assurance that water will be available for the new development. Staff said yes.

MOTION: (Miike/Dela Cruz)
To approve as presented by staff
UNANIMOUSLY APPROVED

DECLARATORY RULING

C-1. Maui Department of Water Supply Petition for Declaratory Ruling

PRESENTATION OF SUBMITTAL: Yvonne Izu

DISCUSSION:

Commissioner Miike stated that the Supreme Court gives priority to the public municipal water systems and in the event the existing users use up water before the new users are allowed that the Commission would have authority to give higher priority to domestic use in the public sector. Deputy Izu indicated that it was stated in a previous Commission meeting that it was not the intent of the Commission to stop Maui Department of Water Supply (MDWS) from using the water until their application is acted on, given the priorities the Supreme Court has set forth on public trust doctrine where domestic uses clearly rise to the top.

Deputy Izu stated that in the subject of abandonment as written in the statutes, goes to the question on if they had good cause for filing late, therefore the issue of abandonment is irrelevant.

Mr. George Tengan from MDWS and Ms. Jane Lovell, Deputy Corporation Council, representing MDWS, spoke on behalf of MDWS. Ms. Lovell stated that the controversy arises because the staff has equated incomplete with late and that the staff's analysis assumes that if an application is incomplete that it must be deemed late. Ms. Lovell indicated that nothing in any of the Waihole Ditch decisions that they could find in the Hawaii Supreme Court decision equate

incompleteness with late. She also states that a number of applications for the water use permit for the Iao Aquifer that have been deemed incomplete by the staff but have not been deemed late. Ms. Lovell said that the only thing that was cited to them was the statute from the water code, 174C-51 and also the implementing regulation, both of which do not state that a signature is required and that it only requires name and address of the applicant. Ms. Lovell states that their application was received by the Commission on July 2, 2004 and signed by Mr. Tengan. Ms. Lovell indicated that the staff submittal has a citation to the Hawaii Administrative Rules, 13-167-25 and that the staff submittal argues, that rules of the application must be read together with HAR 13-167-25. Ms. Lovell mentioned that she thought HAR 13-167-25 related to contested cases and did not apply to applications. Ms. Lovell pointed out that the application has a signature of the party and that the rule 13-167-25 does not indicate that the application requires signatures of all parties. Ms. Lovell suggested that HAR 13-167-27 provides a solution to this dilemma, in that the Commission may require an applicant to amend any document filed with the Commission that is not in substantial conformity with the rules of the Commission as to the contents thereof, or is otherwise insufficient. Ms. Lovell stated that the Commission could find based on HAR 13-167-27, the applicant filed on time, although there was a missing piece and the missing piece was cured by amendment. Commissioner Miike stated that the application is incomplete without a signature. Ms. Lovell said that under HAR 13-171-12, does not specify that a signature is required but only that permit application needs to contain name and address of the landowner.

Commissioner Miike requested that staff look into the new issues raised by Ms. Lovell.

Commissioner Ching asked whether the water use permit is issued to the landowner, water user or both. Deputy Izu indicated that it is issued to both as they are joint applicants. Commissioner Ching asked if the incomplete applications were required to cure before the one-year period. Deputy Izu said yes and that there were other applications that were considered incomplete and late. Commissioner Ching asked staff to explain that the difference is between being a new use versus an existing use. She continued by asking if the other existing users have used up the capacity of the aquifer. Staff stated that existing uses, including MDWS's use of Shaft 33, has not yet exceeded the sustainable yield of the aquifer.

Chairperson Young asked if the landowner and the county's application were for the same purpose and therefore having the signatures on each application serve the purpose of one application. Commissioner Miike indicated that the application for the landowner were for housing not yet built and the County is for existing use and in combining the application, may have to treat them as a new use application. Ms. Lovell stated that the quantity of water requested and source indicated on the both the County and Kehaulani Mauka's application are

identical; therefore placing both applications together would appear to be complete.

Chairperson Young asked if it is clear that all applications require signatures. Deputy Izu stated that Ms. Lovell's argument that HAR 13-167 applied only to contested cases was disingenuous. Subchapter 4 is entitled contested cases; therefore the implication is clear that provisions that are not in this subchapter, apply generally to proceedings before the Commission. Deputy Izu indicated that Ms. Lovell stated that the Water Commission failed to communicate to MDWS by citing 13-167-25, but staff assumed that the application needed to be signed and therefore, did not feel they needed to cite 13-167-25.

Ms. Lovell expressed concerns of MDWS being treated as a new user and standing in line behind the existing user. Ms. Lovell stated that the water code focuses on the existing user, and in this case, would be the MDWS. Ms. Lovell stated that in response to Deputy Izu's comment, Ms. Lovell did not personally focus on sections as applying to the water use permit application. Ms. Lovell indicated that she finds a solution to the problem when looking at HAR 13-167-27.

MOTION: (Frazier/Whalen)
To defer for review by staff and Attorney General
UNANIMOUSLY APPROVED TO DEFER

NON-ACTION ITEMS

D-1. Update to Permitting Process for Wells and Pumps

PRESENTATION OF NON-ACTION ITEM: Roy Hardy

DISCUSSION:

Staff provided a PowerPoint presentation based on the handout that was distributed to the Commission.

NON-ACTION ITEM

D-2. Report on Bureau of Reclamation Meetings (Boulder City, NV) 12/7 to 12/10

Deputy Izu reported that Dean Nakano, Neal Fujii, and she attended two and a half days of meetings with the Bureau of Reclamation (BOR). BOR wants to continue its relationship with the Water Commission and continue to participate in projects in Hawaii.

Deputy Izu said that this is a benefit to the Water Commission as the BOR provides monies that enable the Commission to do things the Commission would not otherwise be able to do.

Deputy Izu acknowledged the staff for their work and stated that it was due to this that the BOR is interested in continuing their relationship.

ANNOUNCEMENTS

Deputy Izu mentioned that the United States Geological Survey has distributed their Scientific Investigations Report on Trends in Streamflow Characteristics at Long-Term Gaging Stations, Hawaii to the Commissioners and that they will be here at the next meeting to conduct a presentation to the Commissioners.

Staff reported that they gave Wailuku Agribusiness on Maui an emergency authorization to remove a small bridge across Waikapu stream as it had contributed to a flooding. Staff also has discussed this with the Department of Health and has asked Wailuku Agribusiness to also contact the Department of Health as well. The bridge has already been removed and staff will come before the Commission for an after-the-fact approval.

NEXT COMMISSION MEETINGS (TENTATIVE)

- 1. January 18, 2005**
- 2. February 16, 2005**

ADJOURNMENT

Meeting was adjourned at 11:27 am.

Respectfully submitted,

KAREN STAHL
Secretary

Approved as submitted:

YVONNE Y. IZU
Deputy Director-Water